Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1996

JAMES A. MERRIAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE TEST FOR CONSTITUTIONAL PUNISHMENT SET OUT BY THIS COURT IN *UNITED STATES v. URSERY* APPLIES TO *IN PERSONAM* SANCTIONS SUCH AS THE SEC LIFETIME BAN FROM PRACTICE IN THE SECURITIES FIELD IMPOSED UPON PETITIONER.

II. WHETHER THE LIFETIME BAR CONSTITUTES CONSTITUTIONAL PUNISHMENT UNDER THE *URSERY* TEST.

III. WHETHER THIS COURT SHOULD DECIDE THE ISSUES PRESENTED HEREIN IN LIGHT OF ITS GRANTING OF CERTIORARI IN *UNITED STATES v. HUDSON*.

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PETITION FOR WRIT OF CERTIORARI

James A. Merriam petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on March 12, 1997.

OPINION BELOW

On March 12, 1997, the Court of Appeals for the Ninth Circuit filed its decision, affirming the district court's denial of petitioner's motion for dismissal on the ground that the government's prosecution of petitioner violates the Double Jeopardy Clause of the United States Constitution. A copy of the appellate decision, reported at 108 F.3d 1162 (9th Cir. 1997), is attached hereto as Appendix A.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is filed within 90 days of the entry of final judgment by the Court of Appeals and is, therefore, timely under Rule 13.1 of the Rules Of The Supreme Court Of The United States.

APPLICABLE LAW

AMENDMENT V TO THE UNITED STATES CONSTITUTION

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor

shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

STATEMENT OF THE CASE[1]

A. SEC Action Against Mr. Merriam.

The events at issue center around a public offering of stock by Vintage Group, Inc., a corporation, formed in 1983, of which petitioner was founder and president. ER 4. A venture capital company, Vintage searches out worthy small businesses in need of start-up and early stage financing and invests the capital of Vintage investors in these small companies. ER 7. Vintage also provides business advice. Petitioner has considerable business experience, having founded the printing company Sir Speedy, building it into a multi-million dollar corporation, and as president of King Cola, Inc.

In early 1990, Vintage made a public offering of five million dollars of Vintage stock. ER 11. Only a few months after the stock was offered for sale, questions arose about the stock issue. In an effort to quell concerns about the stock, Vintage offered rescission and a full refund to any and all persons who had purchased stock. No purchaser of Vintage stock accepted the company's rescission offers.

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[1] References to the record are to documents on file with the Ninth Circuit in the following manner: Trial Court's Docket Sheet is cited as CR ___; Appellant's [*i.e.*, Petitioner's] Excerpts of Record is cited as ER ___; Reporter's Transcript is cited as RT (date) ___.

The SEC commenced an investigation of Vintage operations. At the conclusion of its investigation, the SEC filed a Complaint in the United States District Court for the Northern District of California, styled as *Securities and Exchange Commission v. Vintage Group, et al.*, Civ. Act. No. C94-0772 WHO. ER 1. The complaint alleged six charges against Merriam and Vintage. The first two allege that petitioner, as well as co-defendant Hayes and another co-defendant, James Sheppard, had engaged in a "free-riding" scheme to manipulate the price of the Vintage stock during the period that it was publicly traded, in violation of 15 U.S.C. § 77q(a) and § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5. The identical conduct alleged in the civil case is the basis for the subsequent criminal indictment. *Id., passim.*

A third charge in the indictment alleges that petitioner aided and abetted false SEC filings in violation of section 13(a) of the Securities Exchange Act, 15 U.S.C. § 78m(a) and Rules 12b-20, 13a-1 and 13a-13, 17 C.F.R. §§ 240.12b-20, 240.13a-1 and 240.13a-13.

The remaining charges allege that Vintage and petitioner sold unregistered securities in violation of sections 5(a) and 5(c) of the Securities Act, 15 U.S.C. § 77e(a) and 77e(c), and Vintage was charged with failing to maintain certain books, records and accounts, in violation of 15 U.S.C. § 80a-30(a) and Rule 31a-1, 17 C.F.R. § 270.31a.1. In his capacity as Vintage director, petitioner was charged with breach of fiduciary duty, in violation of 15 U.S.C. § 80a-35(a).

Appellant executed a Consent to the entry of judgment in the SEC action, ER 26, and Judgment was subsequently entered by the District Court. ER 37. Pursuant thereto, petitioner was:

(1) *permanently "restrained and enjoined* with respect to Vintage *or any other registered investment company*, from serving or acting (1) as officer, director, member of any advisory board, investment advisor, or depositor; or (2) as principal underwriter, if such registered investment company is an open-end company, unit investment trust, or face amount certificate company in violation of Section 36(a) of the Investment Company Act of 1940" (ER 42, emphasis added);

(2) *"permanently barred* from acting or serving as an officer or director of any issuer either having a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 781] or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 780(d)] as a result of Merriam's violations of Section 17(a)(1) of the Securities Act [15 U.S.C. § 77q(a)(1)] and Section 10(b) of the Exchange Act [15 U.S.C. § 78j(b)] and Rule 10b-5 [17 C.F.R. § 240.10b-5] promulgated thereunder" (ER 42-43, emphasis added);

(3) *"permanently restrained and enjoined* from" violating each of the statutes and rules relied upon by the SEC in its Complaint: 15 U.S.C. §§ 77e(a), 77e(c), 77q(a), 78j(b) and 78m(a); 17 C.F.R. §§ 240.10b-5, 240.12b-20, 240.13a-1 and 240.13a-13. ER 41 (emphasis added).

In addition, the district court retained jurisdiction over the SEC action in order to "entertain any suitable application or motion for additional relief within the jurisdiction of this Court." ER 44.

B. The Subsequent Criminal Prosecution of Mr. Merriam.

The Indictment alleges precisely the same conduct forming the basis of the SEC investigation and civil complaint, *i.e.*, that Merriam participated in the alleged overstatement of Vintage's assets in the years leading up to the Regulation E stock offering, that Merriam, Hayes and Sheppard engaged in a scheme intended to profit from the manipulation of the market of the Vintage stock, and that Merriam and the other defendants traded in Vintage stock while in the possession of information that misrepresentations were made in connection with the sale of stock.

REASONS FOR GRANTING THE WRIT

I. THIS COURT'S DECISION IN *URSERY* IS EXPRESSLY LIMITED TO *IN REM* CASES AND DOES NOT CONTROL THIS *IN PERSONAM* PROCEEDING.

The Ninth Circuit's opinion rests on an application of the two-pronged Congressional intent and effect and form of sanction test set forth in the Supreme Court decision in *United States v. Ursery*, ___ U.S. ___, 116 S.Ct. 2135 (1996). The Ninth Circuit relied on its earlier holding

in *United States v. Borjesson*, 92 F.3d 954, 955-56 (9th Cir. 1996), *cert. denied*, 117 S.Ct. 622 (1996) for its conclusion that the alternative test set forth by this Court in *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989) (the "any remedial purpose or the primarily remedial purpose" test) does not apply to the question of whether a lifetime bar from a profession rises to the level of constitutional punishment.

Petitioner respectfully submits that *Borjesson* is wrongly decided insofar as it holds that the *Ursery*, not *Halper*, applies to the issue of whether a lifetime bar imposed by judicial decree, and the economic consequences flowing therefrom, constitute punishment.[2]

Emerging from the recent decisions of this Court engaging in a double jeopardy analysis is balkanization of the test to be applied to determine if a particular procedure is criminal, rather than civil, in nature. The decisions clearly hold that the rule to be applied hinges upon whether the proceeding is *in rem* or *in personam*. *Borjesson* is wrongly decided because it applies the *Ursery* test to an *in personam* penalty such as a HUD debarment order. This Court in *Ursery* took pains to parse out the tests that apply according to the type of proceeding involved and, by strong implication, *Ursery* stands for the principle that it does not apply to *in personam* proceedings:

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[2] *Borjesson* also conflicts with an even more recent decision of the Ninth Circuit, *United States v. McClinton*, 98 F.3d 1199 (9th Cir. 1996), which applied the *Halper* test to the imposition of a $500 fine by the United States Customs Service.

> *Halper* dealt with in personam civil penalties under the Double Jeopardy Clause; *Kurth Ranch* with a tax proceeding under the Double Jeopardy Clause; and *Austin* with civil forfeitures under the [Eighth Amendment's] Excessive Fines Clause. *None of those cases dealt with the subject of this case: in rem civil forfeitures for the purposes of the Double Jeopardy Clause.*

115 S.Ct. at 2147 (emphasis added).

Indeed, the chief point of analysis in *Ursery* was the distinction between *in rem* forfeiture proceedings against property, such as that involved in the *Ursery* case itself, and *in personam* proceedings involving sanctions on the individual, such as are involved in this appeal. This Court distinguished its *Halper, Kurth Ranch* and *Austin* decisions along the *in rem/in personam* fault line, noting that it had previously drawn "a sharp distinction between *in rem* forfeitures and *in personam* civil forfeitures such as fines." 116 S.Ct. at 2141 (quoting from *Various Items of Personal Property v. United States*, 282 U.S. 577, 581), 51 S.Ct. 282, 78 L.Ed. 558 (1931).

The *Ursery* Court noted that the *Various Items* case established that though *in personam* civil penalties could, in some circumstances, be punitive, *in rem* penalties could not. *Id.* The *Ursery* Court went on to adopt the two-pronged Congressional intent and punitive form and effect test of *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) as "a useful analytical tool" in evaluating whether an *in rem* proceeding against property under 21 U.S.C. § 881 and 18 U.S.C. § 981 was civil or criminal in nature. 116 S.Ct. at 2147. *Ursery* did not presume to speak to the applicability

of the *Halper* test to *in personam* penalties.[3] Thus, it is the *Halper* test and not the *Ursery* test which applies in this case.

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[3] The *Ursery* test does not fit well in the context of *in personam* penalties. The first prong of the *89 Firearms* analysis is to determine the Congressional intent vis-a-vis the nature of the proceedings – criminal or civil. The second prong looks to whether the penalties are so punitive in form and effect as to render them criminal despite a countervailing Congressional intent. On the Congressional intent prong, *89 Firearms* holds that Congressional intent is revealed through the procedural mechanisms Congress establishes for enforcing the forfeitures. In *Ursery*, this Court noted the facility of this test in the context of *in rem* forfeitures. Because forfeitures under both the drug and money laundering statutes at issue were governed by the customs laws and because forfeiture proceedings under the customs laws are *in rem*, it was easy to conclude that forfeiture proceedings under the drug and money laundering laws were *in rem*. Because this Court's precedent has long established that *in rem* forfeitures, being against the property and not the person of the defendant, are civil in nature, the *Ursery* Court concluded that Congress intended that the property forfeitures authorized by the drug and money laundering statutes in *Ursery* also would be civil in nature. The *Ursery* Court bolstered this conclusion by reference to other procedural mechanisms contained in the drug and money laundering forfeiture statutes.

This analysis does not lend itself to *in personam* proceedings as readily as it does to *in rem* proceedings. The history of *in personam* proceedings does not reveal any clear orientation toward the civil versus the criminal. In fact, some *in personam* proceedings, such as a criminal sentencing hearings have fewer protections than might be supposed, and yet they undoubtedly are criminal. For example, in a federal criminal sentencing hearing after a conviction for a drug trafficking offense, the

Accordingly, the instant petition should be granted because the Ninth Circuit "has decided an important question of federal law in a way that conflicts with the relevant decisions of this Court." Sup.Ct.R. 10(c).

II. EVEN IF *URSERY* CONTROLS, MERRIAM'S LIFETIME BAR FROM HIS PROFESSION CONSTITUTES CONSTITUTIONAL PUNISHMENT UNDER THIS COURT'S PRECEDENT.

A. SEC Sanctions Such As That Imposed Upon Petitioner Are Intended To Be Punitive.

Assuming, *arguendo,* that the *89 Firearms* analytical test should be taken out of the narrow *in rem* context to which *Ursery* confined it and applied to *in personam* proceedings such as the lifetime bar against Merriam (thereby supplanting the *Halper* test), it is clear that the lifetime bar at issue in this case bears all the indicia of constitutional punishment.

Under the first prong of the *89 Firearms* test, Congressional intent, it is clear that Congress intended SEC disciplinary proceedings to be *in personam* and not *in rem.*

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punishment can depend very greatly on the amount of drug involved. Yet, only a preponderance standard and not a standard of beyond a reasonable doubt or even a standard of clear and convincing evidence applies to the government's burden of proof of the amount of drug involved. *See, e.g.,* discussion in *United States v. Rodriguez,* ___ F.3d ___, 116 WL 2160 (7th Cir. 1996) (opinion of Posner, J. dissenting from denial of rehearing *en banc*).

In addressing the first prong of the *Ursery* test, the Ninth Circuit's opinion references a Senate report regarding the purpose of the statute which authorizes the S.E.C. to impose lifetime bans on persons employed in the securities field, Pub.L.No. 101-429, 104 Stat. 931 (1990). The report indicates that the purpose of the statute was to "provide the agency with a broader range of remedies to protect investors and maintain the integrity of the nation's security markets." S.Rep. No. 101-337 (1990), Op. at 2791.

The language cited by the Ninth Circuit does not answer the question posed by *Ursery*, *viz.*, whether Congress intended the sanction to be criminal or civil. Any criminal sanction – imprisonment, fines, or, as here, lifetime debarment – "protect[s] investors and maintain[s] the integrity" of the securities market. Likewise, those sanctions which have been conclusively determined to be remedial, such as *in rem* civil forfeitures and disgorgement orders, "protect the public" by removing funds and property which otherwise would be, or could be, used to perpetuate a crime or fraud. It adds nothing to the analysis to describe a sanction as simply protective of the market or of the public, and thus the Senate report fails to establish Congress' intent regarding the punitive or remedial nature of S.E.C. lifetime bans.

The Ninth Circuit overlooked several more instructive indicators of the government's true intent regarding lifetime bans. In a letter from the S.E.C. to the NASD, the New York Stock Exchange, and the American Stock Exchange, the S.E.C.'s Director of Enforcement and of Market Regulation stated that a ban " *'serves the purpose of general deterrence* and should act as a warning to any

other participant in the securities industry who might be tempted to engage in similar misconduct.' **An unqualified bar is a particularly severe sanction and is reserved for egregious cases.**" ER 180 (No-Action Letter, September 26, 1994, 1994 S.E.C. No-Act. LEXIS 844) at p. 166 (emphasis added).

Several courts have agreed with the S.E.C.'s assessment of the purpose of imposing industry bans on participation, and specifically lifetime bans. In *In the Matter of Blinder, Robinson & Co., Inc.*, 1986 S.E.C. LEXIS 101 (1986), *see* ER 147, the S.E.C. wrote in barring the respondents from the securities industry that:

> Our action is designed to protect the public interest . . . by deterring them from any repetition of their violative practices. The sanctions are a clear message to Registrant, and to Blinder if and when he returns to the securities business, that any recurrence of misconduct will be dealt with severely. At the same time, *the sanctions serve the important purpose of general deterrence*, and should operate as a warning to any other participant in the securities industry who might be tempted to engage in similar misconduct.

Accord, In the Matter of Lester Kuznetz, 1986 S.E.C. LEXIS 1001 (1986), ER 142, slip op. at 146 (S.E.C. Opinion stating that lifetime bars "serve [ ] the purpose of general deterrence and should act as a warning to any other participant in the securities industry who might be tempted to engage in similar misconduct").[4]

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[4] The NASD also views a lifetime bar as the most severe sanction it can impose. The NASD Manual sets forth the

Thus, the weight of authority militates in favor of a finding that lifetime bans from a citizen's chosen profession, such as that suffered by appellant here, are particularly punitive sanctions, and that S.E.C. enforcement actions are intended to punish and deter, as well as remedy violations of the securities laws.

Further, this Court in *Ursery* did not require, as the Ninth Circuit's opinion appears to imply, that in order to be criminal, the proceeding must provide for the same rights afforded a criminal defendant. Although it is true that this Court in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963) did use the existence of such rights as a guidepost in determining the nature of a statute allowing forfeiture of citizenship, this Court has never held this to be *sine qua non* of a criminal scheme. Even if the *Mendoza-Martinez* guidelines were a *sine qua non* of a criminal scheme, they are present in the structure and result of SEC civil proceedings. The SEC rules have the indicia of a criminal proceeding and provide that "[i]n any proceeding in which a hearing is required to be conducted on the record . . . , a party is entitled to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as in the discretion of the Commission . . . may be required for a full and true disclosure of the facts." 17 C.F.R. § 201.326. The SEC further requires the production of witness statements

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possible sanctions for violation of NASD rules in order of increasing magnitude. Expulsion, suspension or disbarment are at the apex of the most serious sanctions. NASD Manual – Complaints, Investigations and Sanctions § 8310.

pursuant to the Jencks Act, 18 U.S.C. § 3500 and issuance of subpoenas. *Id.* §§ 201.231, 201.232. The full range of SEC procedural protections, including subpoena power and the right to witness statements, are at the disposal of a respondent, such as petitioner, who faced a civil proceeding instituted by the SEC.

This bundle of protections reflect the seriousness of a respondent's stake in the proceedings, even more so than the protections afforded by the customs laws to the *Ursery* claimants, therefore reflecting the true punitive nature of a personal lifetime bar.

B. A Lifetime Ban Is So Punitive In Form And Effect That It Constitutes Constitutional Punishment.

The Ninth Circuit's opinion disposed of the second prong of the *Ursery* test in a conclusory fashion, overlooking the fact that the lifetime bar at issue in this case met all of the criteria of *Mendoza-Martinez* for determination of whether a sanction constitutes constitutional punishment.

The Court of Appeal for the D.C. Circuit recently held that even a temporary suspension constitutes punishment. *Johnson v. SEC*, 87 F.3d 484 (D.C.Cir. 1996). In *Johnson*, the defendant had been censured and suspended from acting in a supervisory capacity with any broker or dealer for six months. 87 F.3d at 486. In determining whether this could be considered a "penalty" under 28 U.S.C. § 2462, the court of appeals recognized that "the question of whether a law is penal depends on whether its purpose 'is to punish an offense against the public

justice of the State, or to afford a private remedy to a person injured by the wrong.' " *Id.* at 487, quoting *Huntington v. Attrill*, 146 U.S. 657, 673-674, 13 S.Ct. 224, 36 L.Ed. 1123 (1892). The court noted that censure and suspension "clearly resemble punishment in the ordinary sense of the word," *Id.* at 488, and found that **"there is substantial evidence that Congress and the courts have long considered the suspension or revocation of a professional license as a penalty."** *Id.* at 488-489 n. 6, emphasis added; *see In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) ("[d]isbarment, designed to protect the public, is a punishment or penally imposed on the lawyer"); *Collins Sec. Corp. v. SEC*, 562 F.2d 820, 825 (D.C.Cir. 1977) ("disbarment or suspension [of an attorney] is equivalent to the penalty imposed on Collins by the SEC here"); *Ross v. New York State Dep't of Health*, 640 N.Y.S.2d 359 (1966) (license revocation a penalty). The Court in *Johnson* found that these cases "suggest that the term 'penalty,' for the past two centuries, has been commonly used by legislators and courts in describing license suspensions and revocations." *Id.*

This year, in *United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997), the court of appeals acknowledged that a debarment can, if sufficiently severe, constitute a punishment disproportionate to the benefits received by the government. *Hatfield, supra*, 108 F.3d at 70 (finding that a 26-month debarment from obtaining government contracts was insufficient, as compared to petitioner's *lifetime* ban); *see also United States v. Glymph*, 96 F.3d 722 (4th Cir. 1996) (same finding as to four-year debarment from government contracts).

A permanent bar, in contrast to the above cited cases, goes beyond any conceivable remedial purpose and can be justified only in terms of deterrence – to prevent defendant from repeating the disfavored conduct. *See SEC v. Materia*, Fed. Sec. L. Rep. (CCH) § 99,526 (S.D.N.Y. 1983) (civil complaint brought by SEC is "akin to a criminal prosecution, insofar as its purpose is *to deter future fraudulent conduct and to effectuate public policy*").

This is particularly true for lifetime bans that forever prevent an individual from returning to his chosen profession as a means of earning a livelihood. The inalienable right of all citizens to pursue their occupation of choice has been recognized for centuries.[5]

The Ninth Circuit in the instant case did not address the Supreme Court authority cited by petitioner holding sanctions that serve a retributive or deterrent purpose are punitive and not remedial. *See* Appellant's Reply Brief at 6-7. This Court has historically recognized this. In *Ex Parte Garland*, 71 U.S. (4 Wall.) 333, 377, 18 L.Ed. 366 (1866), the Supreme Court stated that:

> Exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct.

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[5] Joseph H. Choate argued that " . . . no man is unsuccessful who has plenty to do. So long as one can honestly perform his share of the world's work he enjoys the only success it is possible for anybody to achieve." Theron G. Strong, *Joseph H. Choate* (1917). Oliver Wendell Holmes noted that " . . . the most enlightened judicial policy is to let people manage their own business in their own way." *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 411, 31 S.Ct. 376, 55 L.Ed. 502 (1911).

Garland has never been overruled. In *United States v. Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946), the Supreme Court held an Act of Congress that, *inter alia*, on purported loyalty grounds, forbade the use of appropriated funds to pay salaries of particular government employees, to be a bill of attainder and, therefore, unconstitutional. A statute denying an individual the right to earn a livelihood in his chosen way, said the Court, was "***punishment**, and of a most severe type.*" 328 U.S. at 316 (emphasis added).

This Court has held that such a provision "clearly accomplishes the ***punishment*** of named individuals without a judicial trial. The fact that *the* ***punishment*** is inflicted through the instrumentality of an Act specifically cutting the pay of certain named individuals found guilty of disloyalty, makes it no *less galling or effective than if it had been done by an Act which designated the conduct as criminal . . . and sentenced them to perpetual exclusion from any government employment. . . . The effect was to inflict punishment without the safeguards of a judicial trial." Ibid.*

The Court characterized this deprivation of the right to earn a livelihood in a particular way, *i.e.*, as a government employee, to be "*punishment . . . of a most severe type*" and that "it is a type of punishment which has only been invoked for special types of odious and dangerous crimes, such as treason . . . acceptance of bribes by members of Congress . . . or by other government officials . . . and interference with elections by Army and Navy officers." *Ibid.*

From a financial perspective, lifetime bans are substantially similar to deportation – sanctions that courts

have long recognized are punitive in nature. The Supreme Court in *Fong Haw Tan v. Phelan*, 333 U.S. 6, 68 S.Ct. 374, 92 L.Ed. 433 (1948), recognizes that "deportation is a drastic measure and at times the equivalent of banishment or exile . . . [s]uch a forfeiture is a penalty." *See also Scheidemann v. U.S.*, 83 F.3d 1517, 1527 (3rd Cir. 1996) (Sarokin, J., concurring) ("I think the deportation of aliens for the commission of crimes is clearly punishment").

As this Court noted in *Ursery*, "[i]t would have been quite remarkable for this Court both to have held unconstitutional a well-established practice, and to have overruled a long line of precedent, without having even suggested that it was doing so." 116 S.Ct. at 2147.

Accordingly, because the Ninth Circuit failed to follow *Garland, Lovett* and other applicable precedent of this Court, the Ninth Circuit erred on an important question of federal law.

III. THIS COURT SHOULD GRANT THE INSTANT PETITION IN LIGHT OF ITS DECISION TO HEAR *UNITED STATES v. HUDSON*.

The instant petition for writ of certiorari presents substantial questions relating to the appropriate application of the Double Jeopardy Clause to civil penalties such as that imposed upon appellant, which are similar to those at issue in *United States v. Hudson*, 92 F.3d 1026 (10th Cir. 1996), *cert. granted*, ___ U.S. ___, 117 S.Ct. 1425 (April 14, 1997).

Hudson is particularly relevant to the instant petition, because it applied this Court's analysis in *Halper, supra,* 490 U.S. 435, which considered when a civil sanction may be considered punishment for double jeopardy purposes, rather than the analysis set forth in the more recent *Ursery* decision. *Hudson, supra,* 92 F.3d at 1028. In eschewing the analysis of *Ursery* for that of *Halper,* the court stated:

> The recent Supreme Court case of *United States v. Ursery* (1996) ___ U.S. ___, 116 S.Ct. 2135, 135 L.Ed.2d 549, reaffirms that *Halper* controls the case at bar. In *Ursery,* the Supreme Court distinguished between cases involving civil fines and sanctions, which may constitute punishment under *Halper,* and in rem civil forfeitures, which are neither punishment nor criminal for double jeopardy purposes. *Id.* at ___, 116 S.Ct. at 2141-44. Because the case at bar involves civil fines and sanctions, *Halper* controls.

Hudson at 1028 fn. 4.

Appellant Merriam raised the identical argument as that accepted by the Tenth Circuit, *viz.*, that in cases involving civil *in personam* sanctions such as fines and, as in this case, bans from participation in the securities field, rather than *in rem* civil forfeitures, the *Ursery* analysis does not apply. This Court rejected appellant's argument, applying *Ursery* rather than *Halper* or the other cases cited by appellant. Because there exists uncertainty as to the proper analysis to apply to such double jeopardy issues, as well as differences in approach among the various circuits, this Court should grant certiorari so that it might establish a uniform rule of application for cases involving lifetime bans, a sanction not imposed *Hudson,*

but carrying as severe, and often more severe, punitive economic consequences.

CONCLUSION

For the foregoing reasons, petitioner James A. Merriam respectfully requests that his petition for writ of certiorari be granted.

Dated: June 10, 1997

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. JAMES A. MERRIAM, *Defendant-Appellant.*	No. 96-10052 D.C. No. CR 95-00245-FMS

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. HAROLD B. HAYES, *Defendant-Appellant.*	No. 96-10059 D.C. No. CR 95-00245-FMS OPINION

Appeals from the United States District Court
for the District of Northern California
Fern M. Smith, District Judge, Presiding

Argued and Submitted
December 11, 1996 – San Francisco, California

Filed March 12, 1997

Before: Stephen Reinhardt and Pamela Ann Rymer, Circuit Judges; Jack E. Tanner*, District Judge.

Opinion by Judge Tanner

SUMMARY

Criminal Law and Procedure/Securities

The court of appeals affirmed an order of the district court. The court held that a lifetime bar of a securities dealer from association with issuers or exchange members based on fraudulent acts does not bar a subsequent fraud prosecution based on the same conduct.

Appellant James Merriam entered into a consent judgment following a civil complaint by the Securities and Exchange Commission (SEC) alleging violations of the securities laws. The consent judgment provided that Merriam was permanently barred from acting as an officer or director of any issuer of securities that must be registered, or one that must file reports with the SEC.

The National Association of Securities Dealers (NASD) censured, fined and barred appellant Harold Hayes from association with any member in any capacity. The SEC sustained the NASD's disciplinary action.

An indictment charged Merriam and Hayes with conspiracy and securities fraud. They moved to dismiss on

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* The Honorable Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

the ground of double jeopardy, citing the disciplinary actions taken by the SEC and the NASD.

The district court denied the motions to dismiss, concluding that the lifetime bars did not equate to punishment under the Double Jeopardy Clause. Merriam and Hayes took interlocutory appeals.

[1] A two-part test determines whether the Double Jeopardy Clause is implicated. First, the court asks whether Congress intended the proceedings to be civil or criminal. Second, the court considers whether the proceedings are so punitive in fact as to negate Congress' intent. The statute that provides the bar indicated that its purpose was to provide a broader range of remedies to protect investors and maintain the integrity of the nation's security markets.

[2] The preamble to the Maloney Act, which allows the NASD to discipline its members, provides that it was enacted to prevent acts and practices inconsistent with just and equitable principles of trade, and for other purposes. The procedural mechanisms it sets forth do not provide for the rights to which a criminal defendant is entitled. Congress thus intended that such sanctions be remedial in nature and not punitive.

[3] The second part of the test requires the "clearest proof" that the sanctions are so punitive as to render them criminal despite Congress' intent to the contrary. As to Merriam, the consent decree stated that it was for the purpose of resolving the civil proceeding only, and did not affect or preclude any other proceeding that might be brought against him. [4] As to Hayes, the NASD decision

indicated that the bar was imposed to protect the investing public against manipulative activity by those in the securities industry who have a fiduciary obligation to customers.

[5] Under the two-part test, the lifetime bars were remedial and did not contain punishment because Congress intended them to be civil in nature, and nothing about them was so punitive as to negate Congress' intent.

COUNSEL

Alvin H. Goldstein, Jr. and Kelly J. Snowden, Goldstein & Phillips, San Francisco, California, for defendant-appellant Merriam; Larry Kupers, and Mary McNamara, Assistant Federal Public Defenders, San Francisco, California, for defendant-appellant Hayes.

Sandra Stern, Wayne T. Lamprey, Assistant United States Attorneys, San Francisco, California, for plaintiffs-appellees.

OPINION

TANNER, District Judge:

James A. Merriam and Harold B. Hayes appeal the denial of their motion to dismiss an indictment charging them with conspiracy to commit and commission of wire fraud and securities fraud. They claim that lifetime bar orders previously issued against them by the SEC equated to punishment and thus precluded their subsequent indictment under the Double Jeopardy Clause. We have

jurisdiction over this interlocutory appeal under the collateral order exception to the final judgment rule. *United States v. Chick*, 61 F.3d 682, 686 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1416 (1996).

I. The civil actions

A. Merriam.

On March 7, 1994 the SEC filed a civil complaint against Merriam and The Vintage Group, Inc. ("Vintage") involving the allegations later filed in the criminal case plus others. The complaint alleged violations of, *inter alia*, 15 U.S.C. §§ 77e(a) and (c), 77q(a), 78j(b), 80a-35(a), and 78m(a) as well as 17 C.F.R. §§ 240.10b-5, .12b-20, .13a-1 and .13a-13.

On October 20, 1994 a consent judgment was filed and signed by the district court. In that judgment, Merriam consented to the lifetime bar that is the basis for his double jeopardy claim. The consent judgment provides that "Merriam is permanently barred from acting or serving as an officer or director of any issuer either having a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78o(d)]. . . . "

B. Hayes.

On March 6, 1992, the National Association of Securities Dealers ("NASD") through its Market Surveillance Committee ("MSC") initiated disciplinary proceedings against Hayes and others relating to the sale of Vintage

stock. After an evidentiary hearing the MSC concluded that Hayes violated Section 10(b) of the Securities Exchange Act of 1934, Rule 10(b)5 Sections 1 and 18 of the Association's Rules of Fair Practice, Article III Section 1 and 28 of the Association's Rules of Fair Practice, Regulations T and X of the Federal Reserve System, and Regulation E of the Securities Act of 1933. Hayes was censured, fined $300,000 and "barred from association with any member in any capacity." He appealed the MSC decision to the NASD National Business Conduct Committee, who affirmed the decision. He then sought review by the SEC who sustained the NASD's disciplinary action on September 13, 1994.

II. The criminal charge

On July 26, 1995 Merriam, Hayes and one other person were charged in a 34 count Superseding Indictment with violations of 18 U.S.C. § 371 (conspiracy), 18 U.S.C. § 1343 (wire fraud) and 15 U.S.C. §§ 78j and 78ff (securities fraud). The indictment charged that Merriam, Hayes, and one other person manipulated the price of stock in Vintage, a venture capital company owned by Merriam, by engaging in a "free-riding" scheme whereby Merriam, Hayes, and one other person would buy and sell their stock in cooperation with each other and sell it to third parties based upon false and inflated financial data without disclosing that Hayes and the other named individual were "fronted" stock which they subsequently paid back at the original low price after turning a profit at the later inflated price.

Both Merriam and Hayes filed motions to dismiss for violation of the Double Jeopardy Clause. The district court denied the motions ruling that the lifetime bar orders do not equate to punishment.

III. Discussion

We review a district court's denial of a motion to dismiss based on double jeopardy grounds *de novo*. *Chick*, 61 F.3d at 686.

In *United States v. Borjesson*, 92 F.3d 954, 955-56 (9th Cir.), *cert. denied*, 117 S.Ct. 622 (1996), we held that a HUD debarment order issued after conviction but prior to sentencing did not violate the Double Jeopardy Clause. In so doing we held that the analysis is guided by *United States v. Ursery*, 116 S.Ct. 2135 (1996) and not by *United States v. Halper*, 490 U.S. 435 (1989). "In the case of debarment, a non-monetary sanction, quantification is out of the question. *Ursery*, not *Halper* must guide us."[1]

Both Merriam and Hayes attempt to distinguish *Borjesson*. They argue that the HUD statute involved specifically indicated that a HUD debarment was "not for purposes of punishment." 24 C.F.R. § 24.115(b). They argue that the SEC statutes involved do not contain this specific a directive, and, therefore the analysis leads one to the conclusion that they are for deterrent and retributive purposes and are thus punitive. We disagree.

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[1] We therefore reject appellant's argument that *Halper* controls.

[1] *Ursery* sets forth a two part test to determine whether or not the Double Jeopardy Clause is implicated. First, the court asks whether Congress intended the proceedings to be civil or criminal, and, second, the court "consider[s] whether the proceedings are so punitive in fact" to negate Congress' intent. 116 S.Ct. at 2147. As to the first part of the test, Congress' intent can be found in the legislative history of the statute which provides for the bar. The bar was put in by Pub.L.No. 101-429, 104 Stat. 931 (1990) which amended various sections of the securities laws. The Senate report indicates that the purpose of Pub.L.No. 101-429 was to "provide the agency with a broader range of remedies to protect investors and maintain the integrity of the nation's security markets." S.Rep. No. 101-337, (1990). The House report concurs. *See* H.R.Rep. No. 101-616 (1990).

[2] The preamble to the Maloney Act, which allows the NASD to discipline its members, provides that it was enacted "to prevent acts and practices inconsistent with just and equitable principles of trade, and for other purposes." Pub.L.No. 719, ch. 677, 52 Stat. 1070 (1938). The "procedural mechanisms", *see, Ursery,* 116 S.Ct. at 2147, the act sets forth do not provide for the rights to which a criminal defendant is entitled, i.e. "confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel." *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 164 (1963). Thus, Congress intended that such sanctions be remedial in nature and not punitive.

[3] The second part of the test requires the "clearest proof" that the sanctions at issue "are so punitive in form and effect as to render them criminal despite Congress' intent to the contrary." *Ursery,* 116 S.Ct. at 2148. As to

Merriam, the consent decree he entered into specifically refers to 17 C.F.R. § 202.5(f)[2] and states that it was "for the purpose of resolving this civil proceeding only . . . and does not resolve, affect or preclude any other proceeding which may be brought against him."

[4] As to Hayes, the NASD decision indicates that the bar was imposed "to protect the investing public against this form of manipulative activity by those in the securities industry who have a fiduciary obligation to their customers." The SEC concurred.

[5] Therefore, under the two part *Ursery* test, these lifetime bars are remedial and do not constitute punishment because Congress intended them to be civil in

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[2] 17 C.F.R. § 202.5(f) provides in pertinent part:

> It is the policy of the Commission, however, that the disposition of any such matter may not, expressly or impliedly, extend to any criminal charges that have been, or may be, brought against any such person or any recommendation with respect thereto. Accordingly, any person involved in an enforcement matter before the Commission who consents, or agrees to consent, to any judgment or order does so solely for the purpose of resolving the claims against him in that investigative, civil, or administrative matter and not for the purpose of resolving any criminal charges that have been, or might be, brought against him. This policy reflects the fact that neither the Commission nor its staff has the authority or responsibility for instituting, conducting, settling, or otherwise disposing of criminal proceedings. That authority and responsibility are vested in the Attorney General and representatives of the Department of Justice.

nature and nothing about them is so punitive as to negate Congress' intent.[3]

The district court's order is AFFIRMED.

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[3] Both Merriam and Hayes argue that the lifetime bars is a punishment because it bars them from earning a gainful living in their chosen profession. However, the *Borjesson* court, in rejecting a similar plea, noted that "[n]or does [appellant's] characterization of his predicament matter. '[w]hether a sanction constitutes punishment is not determined from the defendant's perspective, as even remedial sanctions carry the 'sting of punishment.' ' " *Borjesson*, 92 F.3d at 956. Every court to consider these types of bar orders has concluded that they do not equate to punishment because they serve a remedial goal. See *Borjesson*, 92 F.3d at 955 (citing cases). And, this court, in the SEC context has ruled that "while securities laws may serve a deterrent purpose, they primarily seek to protect investors and remedy the unjust enrichment." *United States v. Gartner*, 93 F.3d 633, 635 (9th Cir.), *cert. denied*, 117 S.Ct. 624 (1996).

Supreme Court, U.S.
FILED
JUN 10 1997
OFFICE OF THE CLERK

No. 96-1964

In The

Supreme Court of the United States

October Term, 1996

JAMES A. MERRIAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. JAMES A. MERRIAM, HAROLD B. HAYES, and WILLIAM R. SHEPPARD, Defendants.	No. C 95-0245 FMS ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS ON DOUBLE JEOPARDY GROUNDS (Filed Jan. 3, 1996)

Defendants James A. Merriam ("Merriam") and Harold B. Hayes ("Hayes") have moved to dismiss the charges against them on the ground that the Superseding Indictment charges conduct for which Merriam and Hayes have already been punished, in violation of the Double Jeopardy Clause of the Fifth Amendment.[1]

For the reasons set forth below, the Court finds that the instant prosecution of Merriam and Hayes does not violate their Fifth Amendment rights.

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[1] The Double Jeopardy Clause provides: "No person . . . shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amend. 5.

Background

On July 5, 1995, the original indictment in this prosecution was returned by the grand jury. The superseding indictment ("indictment") was returned July 26, 1995. The indictment charges violations of 18 U.S.C. §§ 371 (conspiracy), 1343 (wire fraud) and 2 (aiding and abetting). In addition, violations of 15 U.S.C. §§ 78j and 78ff (securities fraud) are alleged. The indictment alleges that Merriam, Hayes, and William Sheppard ("Sheppard") conspired from approximately March, 1990 until at least August 6, 1990 to drive up the price of stock in a company founded and controlled by Merriam. The Vintage Group, Inc. ("Vintage").

I. SEC Enforcement Action Against Merriam

On March 7, 1994, the Securities Exchange Commission ("SEC") filed a civil action in this court against Merriam and Vintage concerning Vintage and the sale of its stock. The complaint alleged securities fraud in violation of § 17(a) of the Securities Act, 15 U.S.C. § 77q(a), and § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b); materially false filings with the SEC in violation of § 13(a) of the Securities Exchange Act, 15 U.S.C. § 78m(a); sale of unregistered securities in violation of §§ 5(a) and 5(c) of the Securities Act, 15 U.S.C. §§ 77e(a) and 77e(c); failure to make and keep required books, records, and accounts in violation of § 31(a) of the Investment Company Act, 15 U.S.C. § 80a-30(a); and breach of fiduciary duty in violation of § 36(a) of the Investment Company Act, 15 U.S.C. § 80a-35(a). The SEC complaint did not include a claim for conspiracy.

The SEC action was resolved by agreement on October 20, 1994. Merriam executed a consent to the entry of judgment, and judgment was subsequently entered against him. Pursuant to that judgment, Merriam was permanently enjoined from participating in the securities industry in certain capacities and from violating each of the statutes and rules relied upon by the SEC in its complaint. The judgment also stated that the court would retain jurisdiction over the SEC action in order to entertain any suitable application or motion for additional relief within the jurisdiction of the court, as well as to fix the amount of a disgorgement order against Merriam. No monetary penalty or disgorgement was ever ordered, however; civil penalties and disgorgement of Merriam's illegal profits was waived due to Merriam's financial inability to pay.

II. NASD Proceedings Against Hayes

On March 6, 1992, the Market Surveillance Committee ("MSC") of the National Association of Securities Dealers ("NASD") issued a formal complaint against Hayes and Sheppard, among others. The complaint centered on certain trading activities relating to the sale of Vintage stock that occurred in 1990. The complaint alleged violations of the securities laws and the NASD's Rules of Fair Practice.

After an evidentiary hearing, the MSC concluded that Hayes had violated: (1) Section 10(b) of the Securities Exchange Act, (2) Sections 1 and 18 of the NASD's Rules of Fair Practice, (3) Regulations T and X of the Federal Reserve System, and (4) Regulation E of the Securities

Act. The MSC censured Hayes, imposed a fine of $300,000,[2] and barred him from associating with any member of the NASD in any capacity.

Hayes appealed the MSC's decision to the NASD National Business Conduct Committee ("NBCC"). The NBCC affirmed the decision of the MSC, including the MSC's decision regarding sanctions, with respect to which the NBCC noted:

> We believe that the sanctions assessed against Mr. Hayes in this matter are appropriate, in light of the gravity of his violations. We note that Hayes made a profit of $277,000 in connection with his participation in the manipulative activity, and that Hayes' arguments as to mitigation are without merit. We believe that a bar on all capacities is warranted in this matter due to the egregious nature of the violative activity, and to protect the investing public against this form of manipulative activity by those in the security industry who have a fiduciary obligation to their customers.

The NBCC also imposed on Hayes the costs of appeal. Hayes applied for review of the NASD's disciplinary action to the SEC, which affirmed in large part the orders entered by the NASD.[3] The SEC affirmed the sanctions imposed by the NASD, stating that "Hayes' conduct in

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[2] The MSC had concluded that Hayes had realized profits of approximately $277,000 from his fraudulent activity.

[3] The SEC affirmed the NASD's findings of violations in all respects save one, which it set aside.

this case was extremely serious. . . . The NASD's imposition of the orders of censure, fine, and bar are warranted."

Discussion

I. The Law of Double Jeopardy

The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). The third of these protections is at issue here.

In order to determine whether the instant prosecution constitutes double jeopardy, the Court must consider (1) whether the sanctions issued in the earlier proceedings are punishment for purposes of double jeopardy analysis, and (2) whether the offenses for which defendants were initially sanctioned are the same offenses as those for which they are being prosecuted in this case.

In *United States v. Halper*, 109 S. Ct. 1892, 1901 (1989), the Supreme Court described the circumstances under which a civil penalty constitutes punishment for purposes of double jeopardy. The Court held that

> the determination whether a given civil sanction constitutes punishment in the relevant sense requires a particularized assessment of the penalty imposed and the purposes that the penalty may fairly be said to serve. Simply put, a civil as

> well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment. . . . We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction *to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution.*

109 S. Ct. at 1902 (emphasis added).[4] Under this test, the sanctions previously imposed on Hayes and Merriam do not constitute punishment for purposes of the Double Jeopardy Clause.

II. Bar

Bars similar to those imposed here have repeatedly been found to serve remedial purposes. For example, in *United States v. Furlett*, 974 F.2d 839 (7th Cir. 1992), the defendant-broker had previously been barred from trading. The Seventh Circuit held that the bar was not punitive in nature; rather, "the decision to exclude [defendant] from any contract market can be seen as an action to ensure the integrity of the markets and protect them from people like [defendant]." *Id.* at 844. Similarly, in *United States v. Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979), the Eight Circuit concluded that an order permanently barring an individual from acting as a broker-

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[4] Whether the civil penalty occurs before or after the criminal prosecution is irrelevant to a double jeopardy analysis. *See United States v. Sanchez-Escareno*, 950 F.2d 193, 200 (5th Cir. 1991).

dealer in the securities industry was not punitive, but rather "a remedial act to protect the public," *id.* at 812, and therefore was not a bar to subsequent punishment for the same conduct. For the reasons expressed in these cases, the Court finds that the lifetime bars imposed on defendants were remedial in nature and did not constitute punishment for purposes of the Double Jeopardy Clause.

III. Monetary Sanction

Disgorgement, too, is a remedial rather than punitive sanction. *See SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C. Cir. 1994) (because disgorgement order does not ask defendant to "give up anything in excess of the amount of his illicit gains," it is not punitive but rather "remedial in nature"); *United States v. Teyibo*, 877 F. Supp. 846, 863 (S.D.N.Y. 1995) (disgorgement of profits gained and losses avoided that resulted from fraudulent activities "does not serve any goals of punishment such as retribution and deterrence" and is therefore not punishment for double jeopardy purposes).

In addition, where a monetary sanction exceeds the amount of illicit gains, but roughly approximates the expenses incurred by the government or agency in pursuing the case, the reimbursement does not constitute punishment for double jeopardy purposes. For example, in *United States v. Furlett*, 974 F.2d 839, 844 (7th Cir. 1992), a $75,000 fine was deemed remedial. The Court held that where a fine bears a "rational relation" to the expenses the government incurred in investigating and prosecuting the fined criminal, and where the fine is not

disproportionate to the illegal conduct, the fine is not punitive. *See also United States v. Teyibo*, 877 F. Supp. 846 (S.D.N.Y. 1995) ($100,000 compensation for costs incurred in investigating and prosecuting civil action "does not serve any goals of punishment such as retribution or deterrence").

Here, the only monetary sanction was imposed on Hayes, who was fined $300,000. The NASD explicitly found that Hayes' illegal profits totalled approximately $277,000. In response to the Court's request for an accounting of the investigative costs incurred by the NASD in connection with its investigation of Hayes, the government has submitted the declaration of Halley Dunn Milligan ("Milligan"), an employee in the Market Surveillance Department ("MSD") of the NASD. Milligan worked both as an investigator and a supervisor in the investigation of the trading activity in Vintage.

The NASD has not maintained written documentation regarding the costs incurred in the investigation. Furthermore, Milligan explains that one large investigation was conducted with regard to the activities of several parties, including Hayes, rather than a separate investigation into Hayes alone. Milligan states, however, that "Hayes was a major player in the investigation, and the MSD's efforts were centered on him and Sheppard. As such, a large percentage of the time spent and other costs incurred in the . . . investigation can be attributed to the investigation of Hayes." Moreover, Milligan specifically states that a number of the tasks undertaken by the NASD were directly related to Hayes.

According to Milligan's approximations, the NASD's total costs incurred during the investigation range from $70,259 to $82,358.37. Given Milligan's assertion that a large percentage of the time spent and other costs incurred in the investigation can be attributed to the investigation of Hayes, the Court is satisfied that the $23,000 difference between the monetary sanction imposed upon Hayes ($300,000) and his ill-gotten gains ($277,000) is rationally related to the investigative costs associated with the NASD's investigation of Hayes.

Hayes contends that the accounting of the investigative costs incurred by the NASD is deficient, insofar as the figures "derive from the memory of one analyst, are unsupported by documentation, are rife with guesses and generalizations and do not specifically relate to Hayes individually." The Court disagrees. The *Halper* court recognized that assessing a remedial sanction is not an exact science, but rather involves an element of "rough justice." *Halper*, 490 U.S. at 449. Even if a very small percentage of the total investigative costs detailed by Milligan were attributable to Hayes, the Court would be satisfied that the $300,000 monetary sanction was an attempt to estimate the amount of illegal profits obtained by Hayes; although "rough justice" this may be, it is justice, nevertheless. The $300,000 monetary sanction was therefore remedial in nature.

III. Conclusion

For the foregoing reasons, the Court finds that the sanctions imposed by the SEC and NASD against Merriam and Hayes do not constitute punishment for purposes of the Double Jeopardy Clause.

IV. *United States v. $405,089.23 U.S. Currency*

Defendants argue that the Ninth Circuit's recent decision in *United States v. $405,089.23 U.S. Currency*, 33 F.3d 1210 (9th Cir. 1994), *cert. granted* (Jan. 12, 1996) ("*405*"), dictates a contrary result. The Court disagrees. In *405*, the court considered whether civil forfeitures can constitute punishment for double jeopardy purposes. Quoting dicta from *Halper*, the *405* court enunciated the *Halper* "test" as follows: " 'A civil sanction that cannot fairly be said *solely* to serve a remedial purpose, but rather can only be explained as *also* serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.' " 33 F.3d at 1219. Also departing from *Halper*, the *405* court employed a "categorical" rather than an "as applied" analysis to determine that civil forfeitures can indeed constitute punishment. That is, the court rejected the idea announced in *Halper* that the punitive nature of a particular sanction should be determined on a case-by-case basis; instead, the court opted to "look to the entire scope of the statute which the government seeks to employ." *Id.* at 1220.

Defendants urge the Court to adopt *405*'s categorical approach and to look to the punitive nature of SEC enforcement actions and sanctions in general, rather than that of the specific sanctions imposed here. Furthermore,

defendants contend that unless the court finds that the sanctions imposed on Hayes and Merriam were *solely* remedial, the law of the Ninth Circuit requires the conclusion that prior proceedings against Hayes and Merriam constitute punishment for double jeopardy purposes.

Defendants interpret *405* too broadly. The decisions in both *405* and the case upon which *405* relies, *Austin v. United States*, 113 S. Ct. 2801 (1993), deal with the unique context and statutory history of civil forfeitures. *See Austin*, 113 S. Ct. at 2811, n.14; *405*, 33 F.3d at 1220. Furthermore, all courts in the Ninth Circuit that have adopted the reasoning of *405* have done so only in forfeiture cases. *See, e.g., United States v. One 1978 Piper Cherokee Aircraft*, 37 F.3d 489 (9th Cir. 1994); *United States v. Chick*, 61 F.3d 682 (9th Cir. 1995); *Oakes v. United States*, 872 F. Supp. 817 (E.D. Wash. 1994); *United States v. Stanwood*, 872 F. Supp. 791 (D. Ore. 1994).

Because the Court finds that *405* is not dispositive, it looks to *Halper* for the appropriate standard by which to determine whether the sanctions previously imposed on defendants constitute punishment. For the reasons discussed above, the Court holds that they do not.[5]

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[5] Because the Court holds that the sanctions imposed on defendants in the earlier proceedings do not constitute punishment for double jeopardy purposes, it need not consider whether the offenses for which defendants were previously punished are the "same" as those for which they are being prosecuted in this action. Additionally, the Court need not consider the government's argument that Merriam waived his right to contest this action on double jeopardy grounds when he entered into the civil settlement with the SEC.

Defendants' motions to dismiss based on double jeopardy grounds are therefore DENIED.

SO ORDERED.

Dated: January 29, 1996

/s/ Fern M. Smith
FERN M. SMITH
United States District Judge

Supreme Court, U.S.
FILED
JUL 30 1997
CLERK

Nos. 96-1964 and 97-5255

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAMES A. MERRIAM, PETITIONER

v.

UNITED STATES OF AMERICA

HAROLD B. HAYES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Double Jeopardy Clause prohibits petitioners' prosecution on charges of conspiracy and fraud after they were debarred from the securities industry based on the same events as those underlying the prosecution.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a)[1] is reported at 108 F.3d 1162. The opinion of the district court (Pet. Supp. App. 11a-22a) is unreported.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 96-1964. "Pet. Supp. App." refers to the supplemental appendix to the same petition.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1997. A petition for rehearing by petitioner Hayes was denied on April 29, 1997. The petition for a writ of certiorari in No. 96-1964 was filed on June 10, 1997. The petition for a writ of certiorari in No. 97-5255 was filed on July 21, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On July 26, 1995, a grand jury in the Northern District of California returned a superseding indictment charging petitioners with conspiracy, in violation of 18 U.S.C. 371; wire fraud, in violation of 18 U.S.C. 1343; and securities fraud, in violation of 15 U.S.C. 78j and 78ff. Before trial, petitioners filed a motion to dismiss the indictment on double jeopardy grounds. The district court denied the motion, Pet. Supp. App. 11a-22a, and the court of appeals affirmed, Pet. App. 1a-10a.

1. On March 7, 1994, the Securities and Exchange Commission (SEC) filed a civil action against petitioner Merriam and The Vintage Group, Inc., a venture capital company that Merriam controlled. The complaint alleged that, on two occasions, including once in mid-1990, Merriam had fraudulently inflated the price of Vintage stock, misappropriated Vintage funds, and engaged in insider trading. 96-1964 Gov't C.A. Br. 3-5. Based on those transactions, the SEC complaint alleged that Merriam committed securities fraud, in violation of 15 U.S.C. 77q(a) and 78j(b); sold unregistered securities, in violation of 15 U.S.C. 77e(a); failed to make and keep records required by the Investment Company Act, in violation of 15 U.S.C. 80a-30(a); and breached his fiduciary duty under the

Investment Company Act, in violation of 15 U.S.C. 80a-35(a). Pet. Supp. App. 12a.

On October 20, 1994, Merriam executed a consent to entry of judgment in the SEC action, and the district court subsequently entered judgment against him. In the consent to entry of judgment, Merriam admitted that he had received $1,141,030 for his illegal sales of Vintage stock. He was not required to disgorge that or any amount, however, because of his inability to pay. Pet. Supp. App. 13a; 96-1964 Gov't C.A. Br. 5 & n.2. The judgment entered against Merriam provided that he "is permanently barred from acting or serving as an officer or director of any issuer either having a class of securities registered pursuant to Section 12 of the Exchange Act [15 U.S.C. § 78l], or that is required to file reports pursuant to Section 15(d) of the Exchange Act [15 U.S.C. § 78*o*(d)]." Pet. App. 5a (brackets in original).

2. At the relevant times, petitioner Hayes was employed as a broker-dealer by Britson Investments, a brokerage firm registered with the National Association of Securities Dealers (NASD). 97-5255 Pet. 2-3. On March 6, 1992, the NASD's Market Surveillance Committee (MSC) initiated disciplinary proceedings against Hayes and others relating to the sale of Vintage stock. Pet. App. 5a. After an evidentiary hearing, the MSC concluded that Hayes had violated Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and SEC Rule 10b-5, 17 C.F.R. 240.10b-5, as well as several NASD rules and regulations. Hayes was censured, fined $300,000, and barred from association with any member of NASD in any capacity. Pet. App. 6a. Those sanctions were sustained on Hayes's appeal to the NASD National Business Conduct Committee, which found that "a bar in

all capacities is warranted in this matter due to the egregious nature of the violative activity, and to protect the investing public against this form of manipulative activity by those in the securities industry." 97-5255 Gov't C.A. Br. 7 (emphasis omitted). The SEC also upheld the sanction, stating that "there is an ample basis for us to conclude that Hayes poses a significant risk to investors and is unfit to be in the securities industry." *Ibid.* (emphasis omitted).

3. In July 1995, petitioners were indicted on conspiracy, wire fraud, and securities fraud charges. The indictment rested on petitioners' efforts to manipulate Vintage stock in mid-1990 by using false and inflated financial data. 96-1964 Gov't C.A. Br. 3-4. Petitioners moved to dismiss the indictment, alleging that they had already been punished for that conduct by their debarment sanctions. They argued that their conviction and sentencing on the criminal indictment would result in a second punishment for the same offense, in violation of the Double Jeopardy Clause's prohibition on multiple punishments.

The district court denied the motion. Pet. App. 11a-22a. The court rejected the contention that, under *United States* v. *Halper*, 490 U.S. 435 (1989), debarment from participation in commercial activity constitutes "punishment" for purposes of the Double Jeopardy Clause. The court noted that "[b]ars similar to those imposed here have repeatedly been found to serve remedial purposes." Pet. Supp. App. 16a (citing *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) and *United States* v. *Naftalin*, 606 F.2d 809, 812 (8th Cir. 1979)). The court therefore held that the debarment orders were "remedial in nature and did not con-

stitute punishment for purposes of the Double Jeopardy Clause." *Id.* at 17a.[2]

4. The court of appeals affirmed. Pet. App. 1a-10a. Relying on its precedent in *United States* v. *Borjesson*, 92 F.3d 954 (9th Cir.), cert. denied, 117 S. Ct. 622 (1996), the court rejected petitioners' contention that their debarment sanctions precluded their criminal prosecution.[3] Pet. App. 7a. Applying *Borjesson* to this case, the court of appeals held that debarment under the securities laws is a civil, remedial sanction

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[2] The district court also rejected petitioner Hayes's argument that the imposition of a $300,000 penalty against him by the NASD and the SEC constituted punishment. The court noted that the NASD had specifically found that Hayes had reaped profits amounting to $277,000 from his illegal scheme. Pet. Supp. App. 18a. It therefore concluded that the $300,000 penalty was justified as disgorgement, which "is a remedial rather than punitive sanction." *Id.* at 17a. The court also noted that the $23,000 difference between the profits reaped and the penalty was readily attributed to the NASD's investigative costs, which the NASD was entitled to recover under *Halper*. *Id.* at 19a. Hayes did not challenge that aspect of the district court's decision in the court of appeals, and has not done so in this Court.

[3] In *Borjesson*, the court concluded that debarment from federal housing programs serves the remedial purpose of "maintaining the integrity and the appearance of integrity of government programs," 92 F.3d at 955, and thus does not constitute punishment for purposes of the Double Jeopardy Clause. In addition, the *Borjesson* court ruled that this Court's decision in *Halper*—which held that the imposition of a civil penalty that is "so extreme and so divorced from the Government's damages and expenses as to constitute punishment" may constitute double jeopardy when imposed on one who has already been criminally convicted for the same conduct, 490 U.S. at 442—has no application to the sanction of debarment. 92 F.3d at 956.

designed to protect investors and to maintain the integrity of the securities markets. *Id.* at 8a. The court found nothing in petitioners' debarment "so punitive in form and effect so as to render [it] criminal despite Congress' intent to the contrary." *Ibid.* (quoting *United States* v. *Ursery*, 116 S. Ct. 2135, 2148 (1996)). The court also noted that "[e]very court to consider these types of [debarment] orders has concluded that they do not equate to punishment because they serve a remedial goal." *Id.* at 10a n.3.

ARGUMENT

Petitioners renew their contention that the debarment orders entered against them constitute punishment for purposes of the multiple punishments prong of the Double Jeopardy Clause. That punishment, they contend, bars their prosecution on the pending indictment. The court of appeals correctly rejected that contention, and its decision is consistent with the decisions of every other court of appeals that has considered the issue. Accordingly, further review is unwarranted.

1. The Double Jeopardy Clause prohibits both "successive punishments and * * * successive prosecutions." *United States* v. *Dixon*, 509 U.S. 688, 696 (1993); see also *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Although Congress ordinarily "may impose both a criminal and a civil sanction in respect to the same act or omission" without violating the Clause, *Helvering* v. *Mitchell*, 303 U.S. 391, 399 (1938), in *United States* v. *Halper*, 490 U.S. 435 (1989), this Court "announce[d] * * * a rule for the rare case * * * where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he

has caused." *Id.* at 449. The rule in such cases is that "[w]here a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." *Id.* at 449-450. If the civil penalty "does not remotely approximate the Government's damages and actual costs," *id.* at 446, then it constitutes punishment and must be reduced to a remedial level, *id.* at 452.

In *United States* v. *Ursery*, 116 S. Ct. 2135 (1996), this Court held that the *Halper* rule is "impossible to apply outside the context of a fixed civil-penalty provision." *Id.* at 2146. The Court concluded that when a civil sanction "serve[s] a variety of purposes" beyond compensating the government for losses resulting from the defendant's conduct, "the case-by-case balancing test set forth in *Halper*, in which a court must compare the harm suffered by the Government against the size of the penalty imposed, is inapplicable." *Id.* at 2145. In such cases, a nominally civil sanction violates the Double Jeopardy Clause only if the sanction "was intended as punishment, so that the proceeding is essentially criminal in character." *Id.* at 2141-2142.

In *United States* v. *Borjesson*, 92 F.3d 954 (9th Cir.), cert. denied, 117 S. Ct. 622 (1996), the court of appeals, relying on *Ursery*, held that *Halper*'s case-by-case balancing test could not be applied to the sanction of debarment (there, debarment from federal housing programs) because debarment is not a monetary

sanction that can be compared to the government's damages and costs. Here, the court of appeals relied on *Borjesson* to reject petitioner's contention that "*Halper* controls" his case. Pet. App. 7a n.1. Instead, the court of appeals applied the test set forth in *Ursery* and prior decisions of this Court and held that SEC debarment proceedings are not "essentially criminal in character."

The court of appeals' analysis of debarment orders is correct. Whatever the limits of this Court's decision in *Halper*, it cannot apply to a nonmonetary sanction such as debarment, because it is "impossible" to "compare the harm suffered by the Government against the size of the penalty imposed." *Ursery*, 116 S. Ct. at 2145. Moreover, as this Court long ago held, a statutory scheme that provides for debarment is not "essentially criminal in character," because debarment is not a punitive sanction. See *Helvering* v. *Mitchell*, 303 U.S. at 399 & n.2. Instead, debarment from participation in a regulated industry is a remedial sanction because its purpose is "to purge sensitive industries of corruption and thereby protect the public." *United States* v. *Stoller*, 78 F.3d 710, 724 (1st Cir.), cert. dismissed, 117 S. Ct. 378 (1996); see also *United States* v. *Bizzell*, 921 F.2d 263, 267 (10th Cir. 1990) ("[r]emoval of persons whose participation in those programs is detrimental to public purposes is remedial by definition"). For these reasons, every court of appeals that has considered the issue has held that the sanction of debarment does not implicate the Double Jeopardy Clause. See *United States* v. *Glymph*, 96 F.3d 722 (4th Cir. 1996) (debarment from government contracting); *United States* v. *Stoller*, *supra* (ban from service in any federally insured bank); *DiCola* v. *FDA*, 77 F.3d 504 (D.C. Cir.

1996) (debarment from providing services to pharmaceutical companies); *Bae* v. *Shalala*, 44 F.3d 489 (7th Cir. 1995) (debarment from providing services to drug applicants); *United States* v. *Hudson*, 14 F.3d 536 (10th Cir.) (debarment from participating in affairs of any federally insured bank), on remand on other issues, 879 F. Supp. 1113 (W.D. Okla. 1994), rev'd, 92 F.3d 1026 (10th Cir. 1996), cert. granted, 117 S. Ct. 1425 (1997); *United States* v. *Furlett*, 974 F.2d 839 (7th Cir. 1992) (securities trading ban); *Manocchio* v. *Kusserow*, 961 F.2d 1539 (11th Cir. 1992) (debarment from Medicare programs); *Bizzell*, *supra* (debarment from HUD programs). Those decisions are consistent with earlier cases that recognized the remedial nature of license revocations. See, *e.g.*, *Hawker* v. *New York*, 170 U.S. 189, 196 (1898) (law prohibiting felons from practicing medicine is not punishment for purposes of the Ex Post Facto Clause because the "State is not seeking to further punish a criminal, but only to protect its citizens"); *Emory* v. *Texas State Board of Medical Examiners*, 748 F.2d 1023, 1026 (5th Cir. 1984) (revocation of medical license is not punishment because "revocation of privileges voluntarily granted is 'characteristically free of the punitive criminal element'") (citation omitted).

2. There is no need to hold this case pending disposition of *Hudson* v. *United States*, cert. granted, 117 S. Ct. 1425 (1997). In that case, the question presented is whether the Double Jeopardy Clause bars the prosecution on charges of conspiracy, misapplication of bank funds, and making false banking entries of defendants who previously paid $44,000 in civil money penalties imposed by the Comptroller of the Currency. A decision rejecting the double jeopardy claim in *Hudson* would lend no assistance to

petitioners in this case. But even resolution of the double jeopardy claim in *Hudson* in favor of the defendants in that case would not assist the petitioners here, for even if the Court held in *Hudson* that the civil money penalties assessed against the defendants in that case triggered the Double Jeopardy Clause's multiple punishments prong, that decision would not imply that a nonmonetary sanction such as debarment also constitutes punishment. Instead, as the courts of appeals have uniformly held, debarment is a remedial sanction that does not trigger the protection of the Double Jeopardy Clause.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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